

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Order of Conditional
License and Order to Pay a Fine Against
the Family Child Care License of Debbie
Keehl

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge (ALJ) M. Kevin Snell on September 12, 2012, at the Renville County Office Building, 105 South Fifth Street, Olivia, Minnesota. The Office of Administrative Hearings record closed on September 12, 2012 at the close of the hearing.

David Torgelson, Renville County Attorney, Olivia, Minnesota appeared on behalf of the Department of Human Services (the "Department"). Thomas W. Van Hon, Attorney at Law, Fairfax, Minnesota, appeared on behalf of Ms. Debbie Keehl (the "Licensee").

STATEMENT OF THE ISSUES

1. Was Licensee in compliance with all family child care laws and regulations at all times?
2. If Licensee violated family child care laws or rules, did the violations support the imposition of fines for those violations?
3. If Licensee violated family child care laws or rules, did the severity, chronicity or repetition of the violations support imposition of a conditional license?

The ALJ concludes that the evidence supports the imposition of \$400.00 in fines, for two violations. The also ALJ concludes that, although the denial of access was serious, the circumstances and lack of chronicity of Licensee's violations of family child care rules do not require the imposition of a conditional license.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee has been licensed to provide family child care services since October 2002, at her home in Renville, Minnesota ("the home"). Also living in the home is Licensee's husband, Quentin Keehl. Mr. Keehl is a qualified substitute caregiver.¹

2. Licensee's adult daughter, Carrie Keehl, is employed as a nurse. Carrie Keehl was a qualified substitute caregiver for Licensee most recently in approximately 2004. Carrie Keehl had completed all required training, including Sudden Infant Death Syndrome and Shaken Baby Syndrome (SIDS/SBS). Carrie Keehl ceased employment as a substitute caregiver for Licensee because her nursing studies precluded the availability required by Licensee.²

3. Since 2004, Carrie Keehl almost always visits her parents outside of day care hours, one day per week and usually on weekends. She has neither provided care for day care children, nor has she had unsupervised contact with day care children since she ceased her employment with Licensee in 2004.³

4. Ray Lynn Sietsema, a young adult woman, is a good friend of the Keehls and is often present on the Keehl's property during mornings when day care children are present. Both Ms. Sietsema and Mr. Keehl work the evening shift at their places of employment and depart from the home by Licensee's scheduled early afternoon nap time for the day care children. Ms. Sietsema is a demolition derby participant and is usually outside or in the garage working on vehicles with Quentin Keel, either preparing or repairing demolition cars or the restoration of Ms. Sietsema's 1981 Chevrolet pickup.⁴

5. Ms. Sietsema has neither provided direct care for day care children, nor has she had unsupervised contact with day care children.⁵ Ms. Sietsema does, however, occasionally engage in craft projects as a participant with the day care children.⁶ She also occasionally assists the Keehls in preparation and serving of family style meals for the Keehl family and day care children. Her meal participation consists of delivering the food to the table and pouring of beverages. She does not feed the children.⁷

6. Licensee has never permitted anyone to smoke in the licensed home.⁸

Relevant Licensing History

7. When Licensee was relicensed in 2005, the County issued a correction order for three alleged violations: a blocked escape window; items missing from a first

¹ Test. of Debbie Keehl, Patti Hemmingsen, Renville County ("County") Child Care Licensors.

² Test. of Carrie Keehl and D. Keehl.

³ *Id.*; Test. of Jennifer Keehl.

⁴ *Id.*; Test. of Quentin Keehl and Ray Lynn Sietsema.

⁵ *Id.*; Test. of Sandra Deterling.

⁶ Test. of R. Sietsema.

⁷ *Id.*; Test. of D. Keehl and Q. Keehl.

⁸ Test. of D. Keehl.

aid kit; and incomplete enrollment forms. Licensee corrected the alleged violations and no other sanctions were involved.⁹

8. As a result of a 2007 licensing inspection, the County Licenser issued Licensee one correction order for the following alleged violations: utilization of a half (Dutch) door between the living room and the kitchen as a gate; lack of two means of escape in a cluttered bedroom used for children because one window was inaccessible; a child sleeping in a hallway; annual training requirements not completed; a 2005 correction order was not posted; kitchen sink cabinet door latch broken allowing access to toxic substance under the sink; rubbish container in kitchen was uncovered; bleach/water solution not present in diaper changing area; and unshielded electrical outlet in the living room.¹⁰

9. Licensee advised the Licenser that she had taken the correction order down because it was over two years old. Licensee requested reconsideration of the correction order with regard to the Dutch door. The Department affirmed the order and Mr. Keehl removed the Dutch door. Licensee corrected the other alleged violations and no other sanctions were involved.¹¹

10. When Licensee was relicensed in 2010, she had no law or rule violations and was issued no correction order.¹²

2012 Licensing Visits

11. During the summer of 2012, Licensee cared for up to 12 children.¹³

12. On April 19, 2012, the County Licenser made an unannounced visit to Licensee's home in response to a request by Licensee for a short-term variance on infant capacity – until May 11, 2012. The County Licenser inquired about an odor of paint that she smelled when she was in the kitchen. Licensee advised her that her husband was in the attached garage painting. The attached garage is accessed from a door in the kitchen.¹⁴

13. The Keehl's garage is neither licensed nor utilized for child care.¹⁵

14. The County Licenser considered the paint odor strong and possibly toxic, so she requested that a State Fire Marshal conduct an inspection of the garage. The County Licenser advised Licensee that the Fire Marshal's inspection would be

⁹ Test. of P. Hemmingsen.

¹⁰ Test. of P. Hemmingsen.

¹¹ *Id.*; Test. of D. Keehl.

¹² Test. of P. Hemmingsen.

¹³ Test. of D. Keehl.

¹⁴ *Id.*; Test. of D. Keehl.

¹⁵ *Id.*

conducted in the morning on May 7, 2012. However, the fire inspector set the appointment for inspection for 1:00 p.m. on May 7, 2012.¹⁶

15. The fire inspector's protocol for conducting inspections, learned from his formal training, involves the establishment of a cordial and friendly rapport with the occupants of the property before the inspection, in order to gain their confidence. One object of this process is to establish that he knows what he is supposed to be doing and alerts them to what he will be inspecting. He accomplishes this through first talking about possible common interests that he and the occupants or owners may have in common.¹⁷

16. As the fire inspector was attempting to follow his protocol, the County Licenser repeatedly interrupted him and began asking questions about painting in an aggressive and confrontational manner. The County Licenser considered her behavior as "redirecting" the fire inspector to do his job as she thought it should be performed. This behavior compromised any opportunity for the fire inspector to establish a rapport intended to elicit candid information. This created a very tense and hostile environment during the inspection.¹⁸

17. During the fire inspection the County Licenser picked up cans of paint and read the warnings on the cans out loud. Also during the fire inspection in the garage, Mr. Keehl was observing and started to light up a cigarette, at which point the County Licenser told him that he could not smoke in the garage. Mr. Keehl complied and did not smoke. The Keehls and the County Licenser then engaged in an argumentative discussion about whether the garage was part of the day care.¹⁹

18. The fire inspector conducted the inspection in spite of the County Licenser's behavior and concluded that:

- a. The storage of paint in the garage was no danger to the day care children; and
- b. The use of the painting equipment in the garage was no danger to the day care children.

The fire inspector further concluded that there appeared to be a history of conflict between the County Licenser and the Licensee.²⁰

19. Before drafting his final written report, the fire inspector consulted with his supervisor, who told him exactly how he should write his report. The conclusion stated in the report is:

¹⁶ *Id.*; Test. of Jerry Plagge, Minnesota Department of Public Safety Fire Inspector.

¹⁷ Test. of J. Plagge.

¹⁸ *Id.*

¹⁹ Test. of Q. Keehl, D. Keehl and P. Hemmingsen.

²⁰ Test. of J. Plagge.

This was an inspection of an existing daycare's attached garage. The storage and use of cutting torch, welding equipment and paint sprayer in an attached garage is allowed, but should not be used during daycare hours.²¹

20. After the fire inspection was completed, the County Licensur demanded to conduct an inspection of the day care home. Licensee refused, stating that the day care children were napping and she would not allow them to be disturbed during the nap, and that the appointment for the inspection was supposed to have been conducted in the morning, stating further:

You are not going to lie to me and then come into my home.²²

21. The fire inspector had no intention or reason to conduct an inspection of the home.²³

22. On May 8, 2012, the County Licensur issued Licensee a correction order for the following alleged violations: failure to assure there was no smoking in the child care home during hours of operation; failure to assure health and safety of children in regard to toxic substances; and failure to allow her and the fire inspector access to the home.²⁴

23. On May 15, 2012, the County Licensur and a County Case Aide conducted an unannounced inspection of Licensee's home. Upon her arrival, the County Licensur observed that Ms. Sietsema was present in the living room, sitting in a chair. Licensee was on the floor of the living room caring for two infants. In the County Licensur's presence, Ms. Sietsema observed that one infant had dropped its pacifier and she returned it to the infant.²⁵

24. The County Licensur asked Licensee if Ms. Sietsema had received a background study. Licensee replied that she had not. The County Licensur asked Licensee who Ms. Sietsema was and Licensee replied that she was a friend. Based on Ms. Sietsema's presence and the return of the pacifier, the County Licensur concluded that Ms. Sietsema was required to have a background study completed on her and so advised Licensee. This upset Licensee and Licensee sarcastically commented that her adult daughter, Carrie Keehl, would also have to have another background study completed.²⁶

25. The County Case Aide remained in the kitchen while the County Licensur conducted an inspection of the home.²⁷

²¹ *Id.*

²² Test. of Q. Keehl, D. Keehl and P. Hemmingsen.

²³ Test. of J. Plagge.

²⁴ Test. of P. Hemmingsen.

²⁵ *Id.*

²⁶ *Id.*; Test. of D. Keehl and Sandi Robeadeau, County Case Aide.

²⁷ *Id.*

26. During the inspection, Mr. Keehl had just finished making pancakes for those present in the home and brought the garbage container into the kitchen from the garage to dump the refuse into the container. Before he had an opportunity to return the container to the garage, the County Licenser observed the container's presence in the kitchen. She also opened a door to the under sink cabinet in the kitchen, which contains dishwashing detergent. The child-proof latch was loose and Mr. Keehl tightened it immediately.²⁸

27. Based upon the inspection, the County Licenser issued a correction order to Licensee for the following alleged violations: failure to submit background studies for two individual who assisted with the care of children; failure to have those two individuals receive SIDS/SBS training prior to caring for infants and children; failure to post disclosure of cigarette smoking in the home outside of hours of operation; failure to shield electrical outlets in the kitchen and playroom; failure to assure toxic substances were inaccessible to children because of a broken latch on the under sink kitchen cabinet; and failure to assure rubbish was inaccessible to children in care.²⁹

Additional Findings

28. Licensee presently cares for one preschool child and three infants or toddlers.³⁰

29. Current correction orders, and other required postings, are located on a bulletin board and Licensee's license is located on an adjacent mirror in the entryway.³¹

30. Licensee has taken the following remedial measures:

a. All electrical outlets have been replaced with outlets that must be twisted to open the receptacle before access to the electrical plug-in can be made;³² and

b. Two No Smoking During Day Care Hours signs are posted: one on the outside garage door entrance; and one on the garage door entrance from the kitchen to the garage;³³ and

c. After the 2007 correction order, a new diaper changing station with all necessary supplies was installed.³⁴

²⁸ *Id.*; Test. of Q. Keehl. Ms. Hemmingsen testified that she opened the cabinet door with her "pinky." Mr. Keehl testified that she "yanked" open the door. The difference is immaterial.

²⁹ *Id.*

³⁰ Test. of D. Keehl and P. Hemmingsen.

³¹ *Id.*; Ex. 4.

³² Ex. 5; Test. of D. Keehl.

³³ Exs. 1 and 3; Test. of D. Keehl.

³⁴ Ex. 2; Test. of D. Keehl.

Opinions and Support of Day Care Parents

31. Four parents, representing eight day care children, are pleased with the care provided by Licensee. These parents have no safety concerns.³⁵

Procedural Findings

32. After the May 15, 2012 visit to the home, the County recommended to the Department that Licensee be placed on probation under a conditional license.³⁶

33. On June 15, 2012, the Department issued its Order to Pay a Fine and Order of Conditional License (Order) for Licensee's family child care license. The Order to Pay a Fine listed a total of \$800.00 in fines, \$200.00 for each of the following four citations:

- A. Two violations of Minn. Stat. § 245C.03, subd. 1, alleging that background studies were required for two individuals for which Licensee had not submitted an application for background studies; and
- B. Two violations of Minn. Stat. § 245A.50, subd. 5, for the two individuals that had not had background studies, alleging that neither had completed the required training on Sudden Infant Death Syndrome ("SIDS") and Shaken Baby Training.

The Order of Conditional License stated the reasons for the conditional license were for Licensee's violations of: Minn. Stat. §§ 144.414, subd. 2 (prohibition of smoking in licensed group child care residences); 245A.04, subd. 5 (commissioner's access to licensed program facilities); 245A.06, subd. 8 (posting of correction orders); 245A.50, subds. 5 and 7 (training required for reduction of risk of SIDS and annual training); 245C.03, subd. 1 (required background studies for residents, caregivers, helpers, volunteers and individuals that may have unsupervised access to children when the commissioner has reasonable cause); Minn. R. §§ 9502.0335, subp. 2A (access to day care residence by Department licensors during day care hours); 9502.0425, subps. 4, 18 and 19 (regarding means of escape, tamper proof electrical receptacles, and prohibition of smoking in the day care home); and 9502.0435, subp. 3, 4, 6, and 13 (regarding location of rubbish, toxic substances, hazardous activity materials, and diapers).

The terms of the Order of Conditional License, in substance, provide that Licensee must conduct her day care program as follows, under these conditions:

- 1. Follow and comply with all applicable Minnesota Rules and Laws.
- 2. No variances to age distribution or capacity will be granted during the conditional period.

³⁵ Exs. 6 – 8.

³⁶ Ex. 4.

3. Complete eight hours of additional training, including the areas of family child care rule review and health and safety of children, all approved in advance by the County.
4. Submission of a plan to the County licensor for approval, to assure background studies and SIDS/SBS training.
5. Submission of a plan to the County licensor for approval, to assure safe and hazard free child care, including how Licensee will assure the attached garage is not used for welding or painting, and that smoking is prohibited during child care hours.
6. Provide all parents with a copy of or access to the Order of Conditional License and secure the signatures of all parents that they have received that access or copy, and submit the parent signatures to the County.³⁷

34. Licensee filed a timely appeal of the Order and requested an appeal hearing pursuant to Minn. Stat. §§ 245A.07 and 245A.08.

35. On June 26, 2012, the Department issued a Notice and Order for Pre-Hearing Conference (Notice) in this matter to be held, and which was held, on August 1, 2012.³⁸

36. On August 2, 2012, an ALJ issued a Prehearing Order, Order for Hearing and Protective Order, which set the hearing date for September 12, 2012 and was served upon the parties by mail.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

Jurisdiction

1. The ALJ and the Commissioner of Human Services have jurisdiction to consider the appeal of a family child care license decision, pursuant to Minn. Stat. §§ 245A.06, subd. 4, 245A.07, subd. 3, 245A. 08, and 14.50.

2. The Department gave proper and timely notice of the hearing and complied with all procedural requirements of law and rule.

³⁷ Ex. 6.

³⁸ Notice of and Order for Pre-Hearing Conference.

Burdens of Proof

3. Pursuant to Minn. Stat. § 245A.08, subd. 3, the commissioner may demonstrate reasonable cause for the proposed licensing sanction by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the commissioner demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated, at the time that the commissioner alleges the violations of law or rules occurred.

Applicable Definitions

4. Minn. Stat. § 245C.02, regarding the definitions of terms applicable to Chapter 245C, provides, in applicable parts, as follows:

Subdivision 1. **Scope.** The definitions in this section apply to this chapter.

Subd. 2. **Access to persons served by a program.** 'Access to persons served by a program' means physical access to persons receiving services or the persons' personal property **without continuous, direct supervision**, as defined in subdivision 8. . . .

Subd. 8. **Continuous, direct supervision.** 'Continuous, direct supervision' means an individual is within sight or hearing of the program's supervising individual to the extent that the program's supervising individual is capable at all times of intervening to protect the health and safety of the persons served by the program. . . .

. . .

Subd. 11. **Direct contact.** 'Direct contact' means providing face-to-face care, training, supervision, counseling, consultation, or medication assistance to persons served by the program. . . .

Subd. 15. **Reasonable cause.** "Reasonable cause" means information or circumstances exist which provide the commissioner with articulable suspicion that further pertinent information may exist concerning a subject.

. . .

5. Minn. R. 9602.0315, subp. 6, defines **Caregiver** as follows:

'Caregiver' means the provider, substitute, helper, or another adult giving care in the residence.

Family Child Care Law and Rules Alleged to Have Been Violated

Department Access to Day Care Residences

6. Minn. Stat. 245A.04, subd 5 provides in relevant part as follows:

Commissioner's right of access. When the commissioner is exercising the powers conferred by this chapter . . . the commissioner **must be given access to the physical plant and grounds where the program is provided**, documents and records, including records maintained in electronic format, persons served by the program, and staff whenever the program is in operation and the information is relevant to inspections or investigations conducted by the commissioner. **The commissioner must be given access without prior notice and as often as the commissioner considers necessary if the commissioner is investigating** alleged maltreatment, **conducting a licensing inspection, or investigating an alleged violation** of applicable laws or rules. In conducting inspections, the commissioner may request and shall receive assistance from other state, county, and municipal governmental agencies and departments. The applicant or license holder shall allow the commissioner to photocopy, photograph, and make audio and video tape recordings during the inspection of the program at the commissioner's expense. . . . **Failure or refusal of an applicant or license holder to fully comply with this subdivision is reasonable cause for the commissioner to deny the application or immediately suspend or revoke the license.** (Emphasis added.)

7. Minn. R. 9502.0335, subp. 13 provides as follows:

Subp. 13. **Access to residence.** The provider **shall give authorized representatives of the commissioner or agency access to the residence during the hours of operation** to determine whether the residence complies with the standards of parts 9502.315 to 9502.0445. Access shall include:

- A. the residence to be occupied by children in care;
- B. any adjoining land or buildings owned or operated by the applicant or provider in conjunction with the provision of day care and designed for use by the children in care;
- C. **noninterference** in interviewing all caregivers and household members present in the residence on a regular basis and present during the hours of operation; . . . (emphasis added)

Background Studies Required for Caregivers, Helpers, Volunteers and Others

8. Minn. Stat. § 245C.03, subd. 1(2), requires that background studies be conducted regarding any individuals that may have access to children when the commissioner has reasonable cause to do so. Minn. Stat. § 245C.04, subd. 1(d), requires that all license holders submit to the Commissioner completed background forms before anyone may have the opportunity for direct contact with daycare children.

Training Required for Caregivers

9. Minn. Stat. § 245A.50 regarding sudden infant death syndrome and shaken baby syndrome training, provides in relevant part as follows:

1) Subd. 5. **Sudden infant death syndrome and shaken baby syndrome training.** (a) License holders must document that before staff persons, caregivers, and helpers assist in the care of infants, they are instructed on the standards in section 245A.1435 and receive training on reducing the risk of sudden infant death syndrome. In addition, license holders must document that before staff persons, caregivers, and helpers assist in the care of infants and children under school age, they receive training on reducing the risk of shaken baby syndrome. The training in this subdivision may be provided as initial training under subdivision 1 or ongoing annual training under subdivision 7. . . .

No Smoking in Family Child Care Programs

10. Minn. Stat. § 144.414, prohibiting smoking in certain places, provides, in relevant part, as follows:

Subd. 2. **Day care premises.** Smoking is prohibited in a day care center licensed under Minnesota Rules, parts 9503.0005 to 9503.0175, or in a family home or in a group family day care provider home licensed under Minnesota Rules, parts 9502.0300 to 9502.0445, during its hours of operation. The proprietor of a family home or group family day care provider must disclose to parents or guardians of children cared for on the premises if the proprietor permits smoking outside of its hours of operation. Disclosure must include posting on the premises a conspicuous written notice and orally informing parents or guardians.

11. Minn. R. part 9502.0425, Subp. 19 provides:

Smoking prohibited in group family child care home. Pursuant to Minnesota Statutes, section 144.414, subdivision 2, smoking is prohibited in a group family child care provider's home during hours of operation.

Physical Environment Requirements

12. Minn. R. 9502.0425, regarding physical environment requirements, provides in relevant part:

Subp. 4. **Means of escape.** From each room of the residence used by children, there must be two means of escape. One means of escape must be a stairway or door leading to the floor of exit discharge. The other must be a door or window leading directly outside. The window must be openable without special knowledge. It must have a clear opening of not less than 5.7 square feet and have a minimum clear opening dimension of 20 inches wide and 24 inches high. The window must be within 48 inches from the floor.

Subp. 18. **Electrical services.** The following electrical guidelines must be met:

A. all electric receptacles accessible to children under first grade must be tamper-proof or shielded when not in use;

Sanitation and Health Requirements

13. Minn. R. 9502.0435, regarding sanitation and health provides in relevant part:

Subp. 3. **Rubbish.** Indoor and outdoor garbage and rubbish containers must not be accessible to infants and toddlers.

Subp. 4. **Toxic substances.** All medicines, chemicals, detergents, poisonous plants, alcoholic beverages, and other toxic substances must be inaccessible to children. They must be stored away from food products. Equipment or toys which are mouthed or may be chewed must be free of lead-based paint. Toys and equipment with chipped, cracked, or peeling paint must be tested to verify the absence of lead or be replaced. . . .

Subp. 6. **Hazardous activity materials.** Knives, matches, plastic bags, and other potential hazards must be kept out of the reach of infants, toddlers, and preschoolers. The use of potentially hazardous materials and tools must be supervised. . . .

Subp. 13. **Diapers.** Children in diapers shall be kept clean and dry. The following sanitary procedures must be used to reduce the spread of communicable disease.

. . .

C. Diapering must not take place in a food preparation area. The diaper changing area must be covered with a smooth, nonabsorbent surface. If the surface is not disposable and is wet or soiled, it must be washed

with soap and water to remove debris and then disinfected with a solution of at least two teaspoons of chlorine bleach to one quart of water. If the surface is not soiled with feces or urine, then it must be disinfected with the solution of chlorine bleach and water after each diapering.

Posting of Correction Orders Required

14. Minn. Stat. § 245A.06, subd. 8 provides in relevant part as follows:

Requirement to post correction order. For licensed family child care providers and child care centers, upon receipt of any correction order or order of conditional license issued by the commissioner under this section, and notwithstanding a pending request for reconsideration of the correction order or order of conditional license by the license holder, the license holder shall post the correction order or order of conditional license in a place that is conspicuous to the people receiving services and all visitors to the facility for two years.

No Violations Found by the Administrative Law Judge

15. The Department stipulated and conceded on the record that a background study was not required for Licensee's daughter, Ms. Carrie Keehl. The Department therefore failed to demonstrate reasonable cause to believe that the Licensee violated Minn. Stat. § 245A.04, subd 5 and Minn. R. 9502.0335, subp. 13 with regard to her daughter, Carrie Keehl.

16. The Department stipulated and conceded on the record that SIDS/SBS training was not required for Licensee's daughter, Ms. Carrie Keehl. The Department therefore failed to demonstrate reasonable cause to believe that the Licensee violated Minn. Stat. § 245A.1435 with regard to her daughter, Carrie Keehl.

17. There is insufficient evidence in the record to establish reasonable cause to suggest that Ms. Sietsema either had direct contact caring for infants within the meaning of Minn. Stat. § 245C.02 or was not within sight or hearing of Licensee to the extent that Licensee was incapable at all times of intervening to protect the health and safety of the day care children. The Department therefore failed to demonstrate reasonable cause to believe that the Licensee violated Minn. Stat. § 245A.50 regarding SIDS/SBS training for Ms. Sietsema.

18. The Department failed to demonstrate reasonable cause to believe that the Licensee violated Minn. Stat. § 144.414, subd 2 and Minn. R. 9502.0425, subp. 19 on May 7, 2012, with regard to smoking in the day care home.

19. The Department failed to demonstrate reasonable cause to believe that the Licensee violated Minn. R. 9502.0435, subp. 4 on April 19, 2012, with regard to toxic substances, namely, the smell of paint experienced by the Licensor.

20. There is insufficient evidence in the record to establish reasonable cause to suggest that Licensee failed to post correction orders from 2005 for two years. The Department therefore failed to demonstrate reasonable cause to believe that the Licensee violated Minn. Stat. § 245A.06, subd. 8.

21. The Department failed to demonstrate reasonable cause to believe that the Licensee violated Minn. R. 9502.0435, subp. 3 on May 15, 2012, with regard to the rubbish container that was temporarily in the kitchen.

Violations Found by the Administrative Law Judge to Have Occurred

Denial of Access Violation

22. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. Stat. 245A.04, subd. 5 and Minn. R. 9502.0335, subp. 13 on May 7, 2012, when she refused to allow the County licenser access to her residence during day care hours when children were in care. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. Stat. § 245A.04, subd. 5 and Minn. R. 9502.0335, subp. 13 on May 7, 2012 as alleged by the Department.

Background Study Violation

23. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. Stat. § 245C.03, subd. 1(3) because she failed to submit a background study be completed on Ms. Sietsema after receiving a correction order on May 8, 2012 that required her to do so. Licensee has failed to demonstrate by a preponderance of the evidence that she was in full compliance with Minn. Stat. § 245C.03, subd. 1(3) with regard to Ms. Sietsema as alleged by the Department.

Violations Remedied In Response to the May 15, 2012 Inspection

24. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0425, subp. 18, regarding electrical outlet shield requirements on May 15, 2012. Licensee failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0425, subp. 18, on as alleged by the Department. Licensee corrected the foregoing rule violation by installing new electrical outlets.

25. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0435, subp. 4, regarding toxic substances on May 15, 2012. Licensee failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0435, subp. 3, on as alleged by the Department. Licensee's husband immediately corrected the foregoing rule violation on May 15, 2012.

26. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. Stat. § 144.414, requiring the posting of no smoking during day

care hours signs, on May 15, 2012. Licensee failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. Stat. § 144.414, as alleged by the Department. Licensee corrected the foregoing rule violation after May 15, 2012, and prior to the hearing.

Violations Remedied In Response to the September 12, 2007 Inspection

27. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0435, subp. 13, regarding necessary diaper supplies on September 12, 2007. Licensee failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0435, subp. 13, on as alleged by the Department. Licensee corrected the foregoing rule violation after September 17, 2007.

28. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0425, subp. 4, regarding necessary means of escape on September 12, 2007. Licensee failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0425, subp. 4, on as alleged by the Department. Licensee corrected the foregoing rule violation after September 17, 2007.

SANCTIONS

29. Minn. Stat. § 245A.07, subd. 3, allows the Commissioner to suspend or revoke a license, or impose a fine if a license holder fails to comply with the applicable laws or rules.

Violations Requiring Imposition of Fines

30. Minn. Stat. § 245A.07, Subd. 3(c)(4) provides in applicable part

(4) Fines shall be assessed as follows: . . . the license holder **shall forfeit \$200 for each occurrence of a violation** of law or rule governing matters of health, safety, or supervision, including but not limited to the provision of adequate staff-to-child or adult ratios, **and failure to submit a background study**; and the license holder shall forfeit \$100 for each occurrence of a violation of law or rule other than those subject to a \$1,000 or \$200 fine above. For purposes of this section, "occurrence" means each violation identified in the commissioner's fine order. (Emphasis added.)

31. Licensee's May 8, 2012 failure to submit a background study to be completed on Ms. Sietsema was a violation of Minn. Stat. §§ 245C.03, subd. 1 and 245C.04 subd. 1 (d). Under Minn. Stat. § 245A.07, subd. 3(c)(4) the Commissioner is required to impose a \$200.00 fine for a background study violation.

32. Licensee's May 7, 2012, refusal to allow the County licenser access to her residence during day care hours when children were in care was a violation of Minn. Stat. § 245A.04, subd 5 and Minn. R. 9502.0335, subp. 13. Under Minn. Stat.

§ 245A.07, subd. 3(c)(4) the Commissioner is permitted to impose a \$200.00 fine for a refusal of access violation.

Conditional License Sanction for Other Violations

33. Minn. Stat. § 245A.07, subd. 1, requires the Commissioner to consider “the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights” of those persons in a licensee’s program before applying sanctions under Minn. Stat. § 245A.07.

34. Before ordering a conditional license, the commissioner shall evaluate the facts, conditions, or circumstances concerning the program’s operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the license holder. The Department failed to consider the lack of chronicity of law and rule violations by Licensee or available consumer evaluations. The Department has not shown that the continued operation of the program with special conditions is necessary to serve the best interests of children cared for by Licensee.

35. Licensee’s other rule violations were corrected through the utilization of correction orders that were followed. No further sanctions are necessary.

Reduction of Initial Fines

36. The Commissioner should reduce the total fines from \$800.00 to \$400.00. Three of the four alleged violations,³⁹ each resulting in a \$200.00 fine, were not established by reasonable cause. In addition, the May 7, 2012 denial of access merits a \$200.00 fine rather than a conditional license.

37. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

38. The ALJ adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the ALJ makes the following:

RECOMMENDATION

Based upon these Conclusions, the ALJ recommends to the Commissioner of Human Services that:

³⁹ Conclusions 15 - 17.

- (1) the Order to Pay a Fine be **AFFIRMED**, but the fine be reduced to \$400.00;
- (2) the Order of Conditional License be **REVERSED**;
- (3) the Protective Order issued on August 2, 2012, shall remain in effect.

Dated: October 12, 2012

s/M. Kevin Snell

M. Kevin Snell

Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

NOTICES

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, P.O. Box 64998, St. Paul MN 55155, (651) 431-2907 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Burden of Proof

The Department has the burden to demonstrate “reasonable cause” for the imposition of fines and a conditional license on the family child care license of Licensee. As set forth in statute, “the [Department] may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule.”⁴⁰ When such facts are shown that would support a conclusion that a violation occurred, the burden shifts to the license holder to demonstrate compliance with the applicable statute and rules. But if the Department fails to show reasonable cause, the burden does not shift, and the violation must be dismissed.

The Department offered no documentary evidence to support its allegations of law and rule violations by Licensee, such as correction orders. The only documentary evidence in the record is the Order and the Notice that contain allegations. It otherwise relied on the oral testimony of the County Licensors.

Licensing Violations

The ALJ concluded that Licensee committed five recent statutory and rule violations, out of the 14 violations alleged. Two violations occurred in 2007. There is a lack of chronicity and a lack of severity of violations in Licensee’s licensing history. In determining an appropriate licensing action, “the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.”⁴¹

Background Check Violation

There is sufficient evidence to conclude that the Commissioner has reasonable cause to require and conduct a background investigation on Ms. Sietsema. Although she is neither a caregiver, helper or volunteer, she is present in the day care home with sufficient frequency and duration to provide a reasonable person, including the Commissioner, with an “articulable suspicion that further pertinent information may exist concerning” Ms. Sietsema and that she may, however infrequently, have unsupervised access to day care children. The fact that Ms. Sietsema participates with the children in craft activities provides a sufficient basis to require that she be the subject of a background study.

Denial of Access Violation

Licensors, the designees of the Commissioner, have the right and obligation to inspect day care homes during day care hours under Minn. Stat. § 245A.04, subd. 5

⁴⁰ Minn. Stat. § 245A.08, subd. 3.

⁴¹ Minn. Stat. § 245A.07, subd. 1.

and Minn. R. 9502.0335, subp. 13. The law and regulation do not provide for any exceptions during day care hours. Licensee admits that children were in care on May 7, 2012 when she refused access to the County Licensur. The purpose of the regulation is to ensure that any children that may be in care are safe and that Licensees are operating within the laws and rules. Licensees may not refuse entrance to a licensed home during day care hours by claiming that the inspection was not prearranged or that the denial is acceptable because children are napping.

Having any license from the state is a privilege. Each licensee gives up some particular rights by asking to be granted a license to engage in some profession, service or business. Accountability to the public under applicable laws and rules supercedes some rights because the Licensee has agreed to give up those rights by accepting the particular license and agreeing to be bound by the laws and rules applicable to that particular license.

Licensee's right to privacy and the inconvenience of possibly awaking sleeping children is superceded by the right and obligation of the Department to have its designees inspect a licensed day care home during normal day care hours of operation. Licensee's refusal to allow the Licensur access to the residence on May 19, 2012 was an unambiguous violation of both Minn. Stat. § 245A.04 and Minn. R. 9502.0335, subp. 13.

Insufficient Evidence to Establish Reasonable Cause for Alleged Violations

First, the Department stipulated and conceded on the record that there was no basis to the two alleged violations regarding Licensee's adult daughter, Carrie Keehl.⁴²

Second, there was insufficient evidence for a reasonable person to conclude that Ms. Sietsema ever provided direct care to day care children. The Department relies entirely on the County Licensur's single observation that Ms. Sietsema got up out of a chair and retrieved a pacifier that had fallen out of the mouth of one of two infants to whom Licensee was providing care. Licensee argues that the act was a courtesy to Licensee rather than the provision of direct care. The ALJ agrees. The single act of retrieving the pacifier is not the type of evidence that a reasonable person would rely on in the conduct of their serious affairs.⁴³ The Department's position is based on speculation rather than reason. Basing a decision on speculation rather than reason is inappropriate.⁴⁴ Therefore, the requirement for SIDS/SBS training is inapplicable to Ms. Sietsema.

Third, there is no evidence in the record that smoking was permitted in the day care home. When the County Licensur observed Mr. Keehl attempt to light a cigarette in the garage on May 7, 2012, she told him he could not smoke in the garage. He complied with her directive, therefore there was no violation.

⁴² Conclusions 15 and 16.

⁴³ Minn. R. 1400. .

⁴⁴ *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

Fourth, there is no competent or reliable evidence in the record to establish that the paint fumes that the County Licenser could smell were toxic or hazardous. There is no foundation for the County Licenser's opinion that the smell she encountered was toxic or hazardous. Neither the Fire Marshall's report nor his testimony established that paint fumes emanating from the garage were either toxic or hazardous. The report merely suggested that painting not be performed during day care hours. It did not establish that such painting was impermissible or a violation of any statute, rule, or ordinance.

Fifth, there is insufficient evidence in the record to establish reasonable cause to suggest that Licensee failed to post correction orders from 2005 for two years. The correction orders were not part of the record. The County Licenser did not testify as to the date the 2005 correction orders were issued. Therefore, there is no evidence to establish reasonable cause to suggest that the 2005 correction orders were issued after September 17, 2005, which is the date two years prior to the next correction order alleging the violation. Mere conclusory allegations are insufficient to establish reasonable cause.

Sixth, there is insufficient evidence in the record to establish reasonable cause to suggest that Licensee allowed rubbish to be accessible to children. Mr. Keehl was in the process of removing garbage from the kitchen. There is no evidence that he did not complete the task.

Factors to Be Considered by the Commissioner in Determining the Sanction

When determining an appropriate sanction, in addition to considering "the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program," the Commissioner is required to consider:

[T]he facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the ... license holder.⁴⁵

The Department is concerned about Licensee's history regarding the following repeat violations: lack of shields on electrical outlets in 2007 and 2012; rubbish accessible to children in 2007 and 2012;⁴⁶ and access by children to items under the kitchen sink in 2007 and 2012. Second, under the circumstance of this case, a five-year gap between the two repeat violations precludes any conclusion of chronicity of violations. Third, all previous violations alleged were corrected by the Licensee pursuant to the correction orders that were issued.

⁴⁵ Minn. Stat. § 245A.04, subd. 6.

⁴⁶ The 2012 allegation was unsubstantiated.

The Minnesota Court of Appeals has also determined that the knowledge and opinions of day care parents are relevant and desirable in licensing cases.⁴⁷ The evidence of “consumer evaluations” in this record consists of the four parents of eight children that are pleased with the care provided by Licensee and have no safety concerns.

The testimony and documentary evidence of the remedial measures taken establishes that Licensee and her husband now have clear understandings that: an attached garage is part of the day care residence and subject to inspection by the Fire Marshall; smoking in the garage is limited to times outside the operation of the day care. Licensee’s remedial measures of posting No Smoking signs satisfies the requirements of rule and law on those issues.

Conclusion

The evidence suggests that the County Licensors’ determination of violations and recommendation for imposition of a conditional license was based, in part, on personal animosity towards Licensee, rather than sufficient evidence gathered after a deliberative and thorough investigation. The evidence also suggests that Licensee’s attitude and interaction with the County Licensors was less than cooperative and professional. Both need to reflect and approach their future relationship with calm professionalism.

The ALJ concludes that the serious violation of the access law and rule does not require, in order to protect the well-being of the children, imposition of a conditional license. Licensee’s one background check violation is adequately addressed with the fine. For all of these reasons, the ALJ respectfully recommends that one of the three \$200.00 fines be affirmed, and that a \$200.00 fine for the denial of access be imposed in lieu of an Order of Conditional License.

M. K. S.

⁴⁷ See, *Strecker, supra* .